

2021 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1433

2021 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1433
1/27/2021

Workers' compensation benefits for essential workers, retroactive application & expiration date.

(10:59) Chairman Lefor calls the hearing on HB 1433.

Representatives	Attendance
Chairman Lefor	P
Vice Chairman Keiser	P
Rep Hagert	P
Rep Jim Kasper	P
Rep Scott Louser	P
Rep Nehring	P
Rep O'Brien	P
Rep Ostlie	P
Rep Ruby	P
Rep Schauer	P
Rep Stemen	P
Rep Thomas	P
Rep Adams	P
Rep P Anderson	P

Discussion Topics:

- Inclusion of COVID-19 as a compensable injury
- Uncertain cost estimate

Rep Ista~District 43. Attachment # 3549, 3774, 3775.

Landis Larson~AFL-CIO. Attachment # 3726.

Jodi Bjornson~General Counsel~WSI. Attachments # 3631 & 3811.

Arik Spenser~President & CEO of the GNDC. Testified in opposition.

Don Larson~National Federation of Independent Business. Testified in opposition.

Russ Hanson~Independent Contractors Association. Testified in opposition.

Chairman Lefor closes the hearing.

Vice Chairman Keiser moved a Do Not Pass.

Rep Kasper second.

Representatives	Vote
Chairman Lefor	Y
Vice Chairman Keiser	Y
Rep Hagert	Y
Rep Jim Kasper	Y
Rep Scott Louser	Y
Rep Nehring	Y
Rep O'Brien	Y
Rep Ostlie	Y
Rep Ruby	Y
Rep Schauer	Y
Rep Stemen	Y
Rep Thomas	Y
Rep Adams	N
Rep P Anderson	N

Vote roll call taken Motion carried 12-2-0 & Ostlie is the carrier.

Additional written testimony: Attachment #3582.

(11:59) End time.

Ellen LeTang, Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1433: Industry, Business and Labor Committee (Rep. Lefor, Chairman) recommends **DO NOT PASS** (12 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1433 was placed on the Eleventh order on the calendar.



NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



Representative Zachary Ista

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COMMITTEES:

Finance and Taxation
Energy and Natural Resources

January 27, 2021

Chairman Lefor and Members of the House Committee on Industry, Business, & Labor:

I write in **support** of HB 1433, which is a bill to protect North Dakota's essential workers and frontline heroes by allowing them to be awarded workers' compensation benefits if they contracted COVID-19 at their places of work. I urge the Committee to recommend a **DO PASS** on HB 1433.

We can all agree that 2020 was a year unlike any other. We all faced uncertainty, frustration, and even fear. Many of us experienced heartbreaking tragedy. But through it all, we relied on a small group of our fellow North Dakotans to keep us safe, to keep us healthy, to keep us fed, to keep the lights on, and to keep our state running. While the terms themselves may not be new, we came to learn that these folks are truly essential workers and frontline heroes who embody our famous North Dakota work ethic and "North Dakota tough" mentality.

It was a fitting tribute when The Forum named essential workers its persons of the year for 2020, a choice the newspaper noted had "rarely been an easier one . . . to make."¹ To quote from the article:

"Few people have put their lives more at risk during the coronavirus pandemic than essential workers, whose occupations range from assembly line laborers to teachers, doctors to firefighters, and have been working on the front lines trying to keep communities safe, fed and healthy.

Some have paid a heavy price, losing loved ones and at times their own livelihood. Others watched in horror as coworkers dropped from the workplace, wondering if and when their time would come. Despite all the uncertainty, they have kept pushing forward, at times without proper equipment and without acknowledgement, because their jobs are essential."

Like The Forum says, the benefits we all enjoyed on account of these essential workers came at considerable risk to the workers themselves. Through contact with each other and the public, these workers found themselves on the front lines of the war against COVID-19. Many contracted the disease. Some fell seriously ill. A tragic number lost their lives. As state leaders, we have an obligation to recognize those realities not only through our words of thanks and praise, but also through our actions. That's why I've introduced HB 1433.

When someone is injured on the job, he or she usually can rely on the protections and benefits of our worker's compensation system, or Workforce Safety Insurance (WSI). Generally, though, coverage for infectious diseases or other illnesses acquired at the workplace are not considered compensable injuries. And there are

¹ Hagen, C.S., "Essential workers named The Forum's Area Person of the Year," The Forum (Dec. 30, 2020), *available at* <https://www.inforum.com/news/6819319-Essential-workers-named-The-Forums-Area-Person-of-the-Year>.

sound policy reasons why this is usually the case, including the fact that it would be nearly impossible for a worker to prove exactly where he or she caught the disease. Subject to exceptions noted below, this general rule currently excludes compensation for COVID-related injuries. But I don't believe this accounts for our current reality in which a dangerous pandemic has swept across the entire globe and we have called upon essential workers to assume the risk of contracting that disease so that the rest of us can continue to live our daily lives with as little disruption as possible. Given these unique, unprecedented circumstances, I believe we should extend WSI coverage to North Dakota's essential workers who contracted COVID-19 on the job.

Doing so would align North Dakota with many states across the country that have already extended such workers' compensation coverage. According to the National Conference of State Legislatures, as of early December of 2020, at least 17 states have adopted some sort of COVID-related workers' compensation protections. Measures are pending consideration in at least six other states. Indeed, North Dakota itself has already recognized the need to extend WSI coverage to certain essential workers, which Governor Burgum did through Executive Orders 2020-12, 2020-12.1, and 2020-12.2. Respectively, these executive orders provide coverage to first responders, frontline healthcare workers, funeral service workers, and workers providing direct care to persons with intellectual or developmental disabilities.

HB 1433 codifies this existing emergency coverage, extends coverage to a broader swath of essential workers, and enacts a fairer system that better allows workers impacted by COVID-19 to receive WSI benefits. Starting on page 1, line 14, the bill defines which workers qualify for WSI coverage under this proposal. The list represents an attempt to encompass all those essential workers we have relied on since the start of the pandemic. It was derived from reference to definitions used in other states and from the federal government. Among other workers, the list includes healthcare workers, educators and childcare workers, food service and retail employees, laborers, ag and meat processing workers, skilled trade workers, custodial workers, law enforcement, and firefighters. I'm sure, though, that we may have inadvertently missed certain categories of workers or proposed categories that would conflict without other provisions of law. I would welcome any amendments from the Committee to address any such issues.²

The second major provision of the bill begins at page 2, line 12. It sets forth how WSI is to administer COVID-19 claims from essential workers. In short, if the worker can produce a positive lab test for COVID-19 or its antibodies, the bill creates a rebuttable presumption that the applicant's COVID-19 arose out of and in the course of his or her employment. I believe a rebuttable presumption is the best way to protect workers while balancing any concerns about over-extending coverage. As mentioned earlier, it is difficult for a worker to prove where he or she got COVID. Indeed, as of November 27, 2020, WSI advised me it had denied 782 of the 1,759 COVID claims it received pursuant to the Governor's executive orders, which do not enact a rebuttable presumption. Even with 377 additional pending claims unresolved as of that date, that already amounts to a nearly 45% denial rate. My bill tackles this problem by presuming the contraction was in the workplace.³

But such a rebuttal presumption does not mean WSI must always award benefits. Page 3, line 22 sets out how this presumption can be rebutted. There are several ways: 1) showing that the worker was working from

²To that end, I have prepared an amendment for the Committee's consideration that would strike the phrase "except a new construction builder" from page 2, line 11, as it may inappropriately restrict application to certain workers who have provided important services during the pandemic to keep the state moving forward.

³ WSI already applies a similar presumption to firefighters and law enforcement officers who have any condition or health impairment caused by lung/respiratory diseases, hypertension, heart disease, or exposure to blood borne pathogens. *See* NDCC § 65-01-15.1.

home or on leave for at least 14 days immediately before onset of the COVID-related injury, 2) showing that the employer was engaging in industry-specific safety standards like sanitation, social distancing, and use of PPE, and 3) showing that the worker was exposed somewhere besides the workplace. These factors—particularly the second factor—recognize that the most we can ask of our employers during an uncertain situation is to follow best practices for safety standards to keep their workers out of harm’s way as much as possible. If an employer did that, then the presumption is rebutted because it cannot fairly be presumed a worker contracted COVID at a workplace that was closely following the safety rules. This is an appropriate balance between protecting workers and recognizing those businesses that did their best to keep employees safe in a dangerous pandemic.⁴

I would also like to draw the Committee’s attention to page 4, line 20. In subdivision (i), the bill addresses any essential workers who received a grant under North Dakota’s Medical Expense Assistance Program (MEAP). As the Committee knows, this program used outstanding federal aid to offer \$1,000 grants to any qualifying frontline healthcare worker who contracted COVID. While that was a welcome program quickly stood up at the end of 2020, \$1,000 (and higher awards in limited instances) might not be enough to make whole all qualified workers. And according to my conversations with WSI, acceptance of a MEAP grant would foreclose the same worker from applying for WSI coverage under the existing executive orders. I do not believe that restriction was made clear to MEAP applicants, nor do I believe it is a fair restriction to apply. That’s why HB 1433 provides that acceptance of any MEAP funds should be deducted from a WSI award but not foreclose coverage altogether.

Lastly, the bill provides for retroactive application to the beginning pandemic in earnest in North Dakota. It likewise would allow an employee who had a claim denied under the existing executive orders to re-submit such claim to determine eligibility under these new provisions of law. The bill also sets a firm expiration date of July 31, 2023. As a result, the bill seeks to tackle a discrete problem in a limited way.

In sum, the bill sets forth a workable scheme for providing essential workplace protections for our essential workers. With such a complex area of law, though, I appreciate that the bill draft may require further technical revisions. I am happy to work with the Committee on any necessary amendments in that regard.

“But,” some might ask, “won’t this overwhelm the WSI system?” No. Here’s why:

First, the extended coverage only applies to a comparatively small sliver of the overall workforce, which reduces the risk of over-burdening the system. This limitation is supported in the findings of a Workers’ Compensation Research Institute a study of six states that expanded workers’ compensation to certain workers who contracted COVID-19. WCRI found that even the broadest expansion (Kentucky) “created additional claim exposure for only 4% of the state’s workers.”⁵

Second, only those of working age during the pandemic are potential direct beneficiaries of this proposal. As of January 26, 2021, approximately 20% of all confirmed COVID cases were in persons age 60 or older; over 17% of confirmed infections have been in persons aged 19 or younger. Thus, over 37% of all cases have been in persons least likely to be members of the workforce for whom WSI coverage would apply. So, too, have the

⁴ To the extent the Committee remains concerned about the potential for undue burdens on employers, I have prepared an amendment that would prohibit WSI from increasing or modifying an employer’s experience rating on account of any claims filed on the newly created provisions of this bill.

⁵ Sams, Jim, “Expansion of Workers’ Comp for COVID-19 Created Narrow Benefit in 6 States,” Insurance Journal (Dec. 21, 2020), *available at* <https://www.insurancejournal.com/magazines/mag-features/2020/12/21/594661.htm>. Three other states saw expansion covering between 3% and 4% of workers. Minnesota’s coverage extension applied to 2.8% of the workforce, and Missouri’s only to 0.8%.

highest number of deaths occurred within age groups unlikely to qualify for benefits under this proposal (nearly 93% of all deaths in ages 60+, with 82% being over age 70). These demographic realities cap the possible number of viable claims under this provision, as well as the possible number of death benefits payable under this proposal.

Third, early studies have found that the pandemic has resulted in a decline in other, more traditional injury claims, thus offsetting the impact caused by COVID-19 claims.⁶ Early data likewise shows that an average COVID claim is smaller than an average non-COVID claim.⁷ According to one report, the average COVID claim cost nationwide is \$2,366, with less than 1% of all claims exceeding \$75,000.⁸ WSI advised me that it had paid out about \$600,000 on the 600 COVID-based claims it had accepted under the Governor’s executive orders as of November 27, 2020, making the average claim award approximately \$1,000 as of that date. One factor potentially limiting claim values under this bill is the federal law mandating that many employers provide paid leave for quarantined employees. Per current WSI guidance, employees receiving this federal benefit are not eligible for WSI wage-loss benefits; I expect such limitation would likewise apply to any benefits granted under HB 1433. It bears noting, of course, that WSI is also well-positioned to absorb any added cost of new claims, as it had an available fund surplus on June 30, 2020, of over \$880 million, with the potential of reaching \$1 billion in available fund surplus by June 2021.

Fourth, North Dakota has seen a dramatic and positive downward trend in active COVID cases as the calendar turned to 2021. With North Dakota being among national leaders in per capita vaccinations, too, we can expect that trend to continue if we remain diligent. Thus, any ongoing impact on WSI should continue to decrease commensurately as COVID’s impact continues to recede in North Dakota.

Cumulatively, this data shows that we can absorb these expanded claims into our current system. But let us not lose sight that protecting the safety of our essential workers and frontline heroes is also the right thing to do. Unlike many of us, these workers did not have the luxury of working from home and avoiding high-risk situations for contracting COVID-19. Many do not enjoy the privilege of having sufficient paid leave to rely on if they got sick from COVID. And this session, we’ve already voted down whistleblower protections related to COVID, and we are considering legislation that would almost entirely prevent workers from suing their employer over any COVID-related injuries. What we risk ending up with is a system that has a clear message to essential workers: tough luck.

But through HB 1433, we have an opportunity to do better. We have an opportunity to live out our North Dakota values that honor fairness, hard work, and responsibility. We have an opportunity to show that “essential workers” is not just an empty phrase. I urge this Committee to look favorably upon the bill, to make any amendments necessary to address legitimate concerns, and to recommend a **DO PASS** on HB 1433. Thank you, and I stand ready for your questions.

⁶ *Id.* (citing research done by the Insurance Information Institute). In California, for instance, while COVID-19 claims made up 12.8% of all workers’ compensation claims in the state, the total number of all claims had dropped by 12.9% compared to the prior year.

⁷ *Id.*

⁸ Esola, Louise, “COVID-19 comp claims up in 17 states in Q4,” Business Insurance (Jan. 8, 2021), *available at* <https://www.businessinsurance.com/article/20210108/NEWS06/912338984/COVID-19-comp-claims-up-in-17-states-in-Q4>.

21.0323.05001
Title.

Prepared by the Legislative Council staff for
Representative Ista
January 25, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1433

Page 2, line 11, remove "except a new construction builder"

Renumber accordingly

21.0323.05002
Title.

Prepared by the Legislative Council staff for
Representative Ista
January 25, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1433

Page 4, after line 26, insert:

"j. The organization may not increase or modify an employer's
experience rating because of a claim filed for benefits under this
subsection."

Renumber accordingly



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**Testimony of Landis Larson, ND AFL-CIO President
In Support of HB 1433
January 27, 2021**

Chairperson Lefor and members of the House Industry, Business and Labor Committee:

My name is Landis Larson, President of the North Dakota AFL-CIO. The North Dakota AFL-CIO is the federation of labor unions in North Dakota, representing the interests of all working people in our state.

I am testifying on behalf of the North Dakota AFL-CIO in support of House Bill 1433.

Unions have always been at the forefront of advocating for workplace safety, and it should be no surprise to this committee that we support ensuring that Workers Safety Insurance also covers essential workers who have contracted COVID-19 while on the job. Not only should WSI cover these essential worker's claims, we believe that it should be presumed that these workers contracted COVID-19 while at work. This only makes sense based on what we know about how COVID-19 is transmitted, being a combination of exposure and time, both factors that are very prevalent in the workplaces under question in this bill.

We have talked at length about how much we appreciate these essential workers for over a year now. We at the North Dakota AFL-CIO believe that it's time for us to put our words of appreciation into action that lends a hand to these invaluable workers whose labor has provided us all with the essentials to get us through this difficult time. Offering them some respite and security when they get sick while on the job on the frontlines of the pandemic is one of the least of things we could do for these working people and their families.

I recommend a "Do Pass" recommendation on House Bill 1433.

Respectfully Submitted,
Landis Larson
North Dakota AFL-CIO President

2021 House Bill No. 1433
Testimony before the House Industry, Business and Labor Committee
Presented by Jodi Bjornson
Workforce Safety and Insurance
January 27, 2021

Mr. Chairman and Members of the Committee:

My name is Jodi Bjornson, and I am the General Counsel at WSI. I am here today to provide testimony regarding House Bill No. 1433. The WSI Board does not support this bill which proposes to provide a presumption of workers' compensation coverage for essential employees who contract COVID-19.

By way of background, N.D.C.C. section 65-01-02(11)(b)(1) provides a compensable injury does not include "[o]rdinary diseases of life to which the general public outside of employment is exposed". As a result, illnesses such as influenza and the common cold are not compensable under North Dakota workers' compensation law. These types of illnesses are generally excluded from workers' compensation coverage because of the difficulty in determining the source of contraction. This is demonstrated with COVID-19 where those spreading the virus can be asymptomatic.

ND Exec. Order No. 2020-12 temporarily suspends section 65-01-02(11)(b)(1) for first responders and health care providers assisting in the State's emergency response to the COVID-19 pandemic. Executive Orders 2020-12.1 and 2020-12.2 also extend COVID-19 coverage to funeral home personnel and direct care providers for disabled individuals. The Executive Orders are effective during the Emergency period and employees are eligible to file claims for work-place exposures occurring throughout the duration of the Emergency period.

As of March 13, 2020, the employees covered under the Executive Orders who are exposed to COVID-19 in the course of employment can file a claim for worker's compensation coverage and be eligible for up to fourteen days of wage replacement and medical coverage if quarantined. If COVID-19 is contracted, these employees are eligible for full workers' compensation benefits.

A rather measured approach was taken in providing coverage under the Executive Orders because of the lack of information available about the virus to adequately assess the impact of COVID-19 coverage to the Workers' Compensation Fund. Workers' compensation claims can develop slowly, and the payout patterns can extend for many years. Once a claim is accepted, WSI can be liable for medical and indemnity payments for the life of the injured employee.

There are several differences in the Executive Orders and the proposed bill. The bill before you would expand the coverage provided in the Executive Orders. Subsection 1(b) of the bill provides thirty-four separate categories of essential workers, resulting in approximately 306,723 covered employees, in contrast to the Executive Orders which

covers approximately 62,460 employees. This employee count is further narrowed in the Executive Orders by the requirement exposure must have taken place when rendering frontline services in the identified capacity.

Under the bill, when an essential worker tests positive for COVID-19 or COVID-19 antibodies, a rebuttable presumption is created that the virus was contracted at work and is a compensable injury. When it applies, the presumption eliminates an employee's requirement to prove the elements of the claim.

Under the Executive Orders, there is no presumption, and the employee has the burden to prove the claim resulted from their employment and was contracted from a person for whom services or care was being provided. In addition, the Executive Order provides quarantine benefits and does not allow for antibodies tests to prove contraction of the disease. On the other hand, the proposed bill does not provide quarantine benefits and allows for antibodies tests. This creates two benefit structures for COVID-19 claims.

The bill also provides the presumption can be rebutted, meaning it can be disproven by a party. The proposed law suggests the presumption can be rebutted by demonstrating the employee was away from the workplace for the requisite number of days prior to the exposure, demonstrating certain COVID-19 safety practices were strictly followed prior to the employee's diagnosis, or proving the infected employee was exposed from an alternative source. We question whether rebutting the presumption will be feasible or worthwhile for an employer. There is inherent difficulty in rebutting a presumption of contraction with a virus that is highly contagious and carriers can be asymptomatic.

Finally, I direct your attention to the fiscal note developed by WSI and its actuarial consultants. An attempt was made to estimate the cost of the benefits under this bill. It is noted COVID-19 is a new phenomenon to workers' compensation coverage and the data used is relatively immature. As a result, reasonable assumptions were made to estimate a benefit cost through July 31, 2023 to be in the range of \$40 million to \$85 million. There is considerable uncertainty in these estimates and entirely possible the ultimate result could be outside this range.

This concludes my testimony and I would be happy to answer any questions at this time.

**WORKFORCE SAFETY & INSURANCE
2021 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION**

BILL NO: HB 1433

BILL DESCRIPTION: Definition of Essential Workers and COVID-19 Coverage

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its consulting actuaries, The Burkhalter Group, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation defines essential workers and outlines parameters for COVID-19 coverage.

FISCAL IMPACT:

Workforce Safety and Insurance, together with its consulting actuaries, The Burkhalter Group, has attempted to estimate the cost of additional benefits provided under this bill. Data sources included the actual experience reported through December 31, 2020 under the Governor's Executive Orders and employee counts by occupation derived from U.S. Bureau of Labor Statistics (BLS). The COVID-19 pandemic is a new phenomenon to workers' compensation coverage, and the reported experience is relatively immature at December 31, 2020. Thus, reasonable assumptions had to be selected in certain areas of the calculations. It is estimated that additional benefit cost through July 31, 2023 of HB 1433 is in the range of \$40,000,000 to \$85,000,000. It should be noted that there is considerable uncertainty in these estimates. It is entirely possible that, if HB 1433 is passed in its present form, the ultimate result could be outside this range.

DATE: January 26, 2021



NORTH DAKOTA STATE BUILDING AND CONSTRUCTION TRADES COUNCIL

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© GCU 250-C

January 27, 2021

To the Honorable Mike Lefor and Member Representatives of the House Industry,
Business and Labor Committee

RE: House Bill 1433; Compensation Benefits for Essential Workers

The North Dakota State Building and Construction Trades Council is in support of HB 1433. Including COVID-19 as a compensable injury commits to making essential workers whole due to an injury resulted from the exposure to and contraction in the performance of their duties.

The impacts of the virus have been felt all over North Dakota. The State and municipalities have taken remarkable steps to mitigate the spread of the virus in the workplace through varying strategies e.g., PPE, plexiglass dividers, deep-cleaning, work-from-home, etc. However, there was still a significant number of workers deemed essential that required their presence in the workplace. These workers provided a service that was of absolute necessity for day-to-day existence of society. Many essential workers put their own health and well-being on-the-line while doing their jobs.

It is not without consequence that when considering the long-lasting effects of COVID-19, the full understanding of such an event has yet to be realized. HB 1433 provides a way to those workers deemed essential a methodology to returning what they have lost due to the extraordinary events of the recent past. As with all workers who have been adversely affected while in the duties of their jobs, this legislation seeks to improve livelihoods to the best possible outcome.

We respectfully urge a do pass recommendation for HB 1433.

With Kindest Regards, I am

Jason Ehlert
President
Lobbyist No. 347
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